UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 96-53804-JRG

SANG V. TRAN,

Debtor.
__________________________________/

CITIBANK (SO. DAKOTA) N.A., Adversary No. 96-5500

Plaintiff,

vs.

SANG V. TRAN,

Defendant.
__________________________________/

MEMORANDUM DECISION

I. INTRODUCTION

In this case Citibank seeks a judgment of nondischargeability under § 523 of the Bankruptcy Code. It seeks a judgment for a series of cash advances taken by the defendant on his credit card to cover gambling losses. For the reasons hereafter stated the court finds the obligation dischargeable.

II. LEGAL STANDARD

A. Establishing a Claim for Fraud.

To establish a claim for fraud under § 523(a)(2)(A) Citibank must prove that a materially false representation was made by the defendant, with knowledge of its falsity, and with an intent to defraud, that the plaintiff justifiably relied on the representation, and that damage proximately resulted. In re Church, 973 F. 2d 1454 (9th Cir. 1992); In re Britton, 950 F.2d 602 (9th Cir. 1991); In re Howarter, 114 B.R. 682 (9th Cir. B.A.P. 1990). Claims arising under § 523 need to be proven only by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed. 755 (1991).

B. Application to Credit Card Cases.

In applying the § 523 elements to credit card cases, there are three essential inquiries: (1) did the card holder fraudulently fail to disclose his intent not to repay the credit card debt; (2) did the card issuer justifiably rely on a representation by the debtor; and (3) was the debt sought to be discharged proximately caused by the first two elements. In re Eashai, 87 F.3d 1082 (9th Cir. 1996). In most credit card relationships there are two separate points in time. The first point is when the card is issued and the court normally assumes that there is an intent to repay at that time. Each time the cardholder uses the card, there is a representation of an intent to repay. In cases of fraud there is also the point in time at which the card holder forms the intent not to repay. As a result, the trial court must scrutinize the evidence in an attempt to identify the point at which the cardholder's intent changed. Intent not to repay can be evidenced by an elaborate kiting scheme such as in the Eashai case or by the behavior that is commonly referred to as "loading up." In re Anastas, 94 F.3d 1280 (9th Cir. 1996).

In In re Dougherty, 84 B.R. 653 (9th Cir. BAP 1988) the Bankruptcy Appellate Panel approved a "totality of the circumstances" approach for determining intent.[1] This approach was subsequently adopted by the Court of Appeals in Eashai. Eashai, 87 F.3d at 1090. Thus, all of the circumstances surrounding the defendant's use of the card become relevant.

III. DISCUSSION

The facts of this case appear simple at first blush. The defendant obtained a credit card from Citibank in early July 1995. The card had a $4,000 limit. The defendant was a heavy gambler at local card clubs. In December 1995, in a period of nine days, the defendant drew $3,569.95 against the credit line to cover gambling losses.

At the time of the cash advances the defendant owed over $35,000 on other charge cards, money which he had borrowed to cover gambling losses. The minimum monthly payments on his outstanding credit card debt exceeded $1,000. The defendant's net monthly income approximated $1,560 and his expenses equaled this amount

[1] In Dougherty the Court suggested a number of factors that could guide the court with respect to its examination of intent: (1) The length of time between the charges made and the filing of bankruptcy; (2) Whether or not an attorney has been consulted concerning the filing of bankruptcy before the charges were made; (3) The number of charges made; (4) The amount of the charges; (5) The financial condition of the debtor at the time the charges were made; (6) Whether the charges were above the credit limit of the account; (7) Whether the debtor made multiple charges on the same day; (8) Whether or not the debtor was employed; (9) The debtor's prospects for employment; (10) Financial sophistication of the debtor; (11) Whether there was a sudden change in the debtor's buying habits; and (12) Whether the purchases were made for luxuries or necessities.

without taking into account the minimum monthly payments required on his credit cards.

Taking an objective look at these facts, it seems extremely unlikely that the defendant could ever repay Citibank. However, this Circuit has rejected an objective test for fraud. In using a credit card the representation is not that the cardholder has the ability to repay the debt but that he or she has the intention to repay it. The court's focus must be solely on whether the debtor maliciously and in bad faith incurred credit card debt with the intention of petitioning for bankruptcy and avoiding the debt. In re Anastas, 94 F.3d 1280 (9th Cir. 1996). In examining intent in this case a ten year pattern of behavior by the defendant becomes relevant.

The defendant began gambling heavily in 1986. Over the years he usually lost more than he won. He traditionally used cash advances from credit cards to cover the losses. He always made the minimum monthly payments. To do so he would use his occasional winnings, his salary and, periodically, he would borrow from the retirement plan established by his employer, or take his tax refund, and use these funds for minimum payments and to pay off some of his credit cards. In fact, prior to the subject credit card, he had two previous cards issued to him by Citibank. The first was in 1989 and the second sometime between 1990 and 1992. Both cards were used like all the others, to cover gambling losses.[2] With respect to each of the previous cards, at some point

[2] The defendant did not conceal the purpose for which he used his credit cards. Most charges are cash advances obtained directly at local card clubs.

the defendant paid off the entire amount owed and sent the card back to Citibank.

The defendant obtained the present Citibank card as the result of a mail solicitation. Citibank ran a credit check on the defendant which revealed that he had about $30,000 in credit card debt but that he was current with all his minimum monthly payments.[3] Because he was current, Citibank sent the solicitation to which he responded. In his response he indicated that his gross annual income was $35,000.

Citibank apparently does not do any analysis as to whether the prospective cardholder will be capable of fully paying off the debt he is carrying, only whether the minimum monthly payments will be made.[4] Since it was satisfied in this regard, Citibank sent the card.[5]

The defendant used the card almost immediately to cover gambling losses. On July 28, 1995, the defendant took $3,095.97 in cash advances at local card clubs. However, these charges were repaid in full on September 5, 1995.[6] There appears to have been

---

[3] The court notes that the amount the defendant owed at the time the card was issued is not substantially less than the amount owed at the time of bankruptcy.

[4] The defendant raised the issue of justifiable reliance. The court need not address this issue as it has found a lack of intent to defraud.

[5] The court notes that the defendant’s application also showed job stability in that he had worked for the same company for 12 years and that he indicated that he was a homeowner.

[6] This case is not similar to Eashai which involved an elaborate kiting scheme evidencing an intent not to repay from the very beginning. Plaintiff introduced evidence that the defendant transferred balances on other cards he acquired. Transferring balances does not, in and of itself, establish fraud. “It is well known that credit card issuers compete for new users and a great deal of the marketing effort encourages customers to transfer credit card

no other use of this card until the December advances which are the subject of this action. After the December advances, the defendant made a payment of $39 on February 7, 1996, which was less than the minimum monthly payment required of $78. No other payments were made and on May 21, 1996, the defendant filed his Chapter 7 petition.

In examining the evidence presented, the court can find no change in the defendant's conduct regarding his use of credit cards over the years. He used this card the same way he used all the others, to support his gambling addiction. What changed was his physical condition. He testified that he drank heavily while gambling. His alcoholism led to serious health problems in early 1996. After consulting his doctor, he committed to alter his life style and eliminate both his drinking and his gambling. It was not long thereafter that he realized that there was no way he could pay off the credit card debt he had accumulated. The defendant is not sophisticated financially. He is simply a machine operator for a company in the Hi Tech industry. The court finds his testimony to be credible.

IV. CONCLUSION

In order to find for the card issuer the court must be able to identify the point in time when the cardholder no longer intends to repay the charges being incurred. In this case the court is

---

balances, usually at very low interest, to a new issuer. It is not at all unlikely for a person of average means to receive new credit cards unsolicited. Even where the invitation requires an application before issuance, the inducements may be too attractive to resist by people who should." Eashai, 87 F.3d at 1092-93. Circuit Judge O'Scannlain specially concurring.

unable to articulate specific facts demonstrating such an intent not to repay. As a result, the plaintiff has failed to carry its burden and the court must find for the defendant.

The foregoing shall constitute the court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 and Federal Rule 52. Counsel for defendant shall lodge a proposed form of judgment with the court within 15 days. It need not contain the findings of fact and conclusions of law which the court has made in this memorandum.